SUPREME COURT, U.S.
FEB 5 1974
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IN THE

Supreme Court of the United States

OCOBER TERM, 1973

No. 73-1206

FRANK J. VALENTI, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, FRANK J. VALENTI, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 13, 1973.

OPINION BELOW

No opinion was rendered by the United States Court of Appeals for the Second Circuit, or by the United States District Court for the Western District of New York. A copy of the judgment of the Court of Appeals is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 13, 1973. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1). This Petition is not timely filed within 30 days of August 13, 1973, as required by Rule 22 (2), for reasons set forth in the paragraphs that follow.

The Petitioner is 61 years old and has been continuously incarcerated for approximately one year. During that period, he has been in extremely poor health, suffering from a variety of cardiac and gastrointestinal disorders. From April 3, 1973, until May 31, 1973, he was confined to a hospital in Rochester, New York, during which time he underwent major surgery. He was again hospitalized from July 18, 1973, until August 15, 1973, for additional surgery at the same hospital and was discharged on a wheelchair basis.

The undersigned counsel has been advised by Petitioner's counsel in the Second Circuit that he did not notify the Petitioner of the action of the United States Court of Appeals for the Second Circuit on August 13, 1973, at the request of members of the Petitioner's family who expressed fears that news of the decision might have an adverse effect upon him due to his poor state of health.

The undersigned counsel has been advised by the Petitioner that he did not learn of the action of the United States Court of Appeals for the Second Circuit until late November 1973, at which time he requested his brother to make inquiry with Petitioner's counsel in the Second Circuit as to what further steps

might be available to him to seek a reversal of the decision of the Second Circuit. On or about December 5, 1973, and before he was able to confer with counsel and give instructions to proceed, the Petitioner sustained a heart attack and was again hospitalized until December 13, 1973, at which time he was taken directly from his hospital bed in a wheelchair to a United States District Court for arraignment on unrelated charges that had been pending for many months and for which he had been unable to appear because of his poor health. The Petitioner continued in poor health, and later in December, was transferred to the Federal Prison in Springfield, Missouri, where he was immediately placed in the intensive care unit of its Medical Center.

It has only been in the week prior to the filing of the instant Petition that the undersigned counsel has been able to confer with the Petitioner and obtain from him specific directions to file the instant Petition. In the event that this Court does not entertain the Petition because of Rule 22 (2), the Petitioner will have no alternative but to file an appropriate Motion in the United States District Court for the Western District of New York under Title 28, United States Code, Section 2255, or other appropriate statute, to appeal any adverse determination in such proceedings to the United States Court of Appeals for the Second Circuit, and again to file a Petition for a Writ of Certiorari in this Court in the event of an affirmance by the Second Circuit. Entertainment of the instant Petition would therefore avoid such a circuity of legal procedures. *Heflin* v. *United States*, 358 U.S. 415. Since the time limitation contained in Rule 22 (2) is not jurisdictional, this Court possesses the discretion

to waive compliance with the Rule and thus avoid wasteful circuity of action. *Taglianetti* v. *United States,* 394 U.S. 316; *Hicks* v. *District of Columbia,* 383 U.S. 252.

QUESTIONS PRESENTED

Is an accused denied a fair trial and Due Process under the Fifth Amendment when, in his trial for violations of the Hobbs Act, the Prosecutor, in closing argument:

1. Refers to the accused and his co-defendants as an "insidious cancer on society;"

2. Accuses the attorney for the accused of "deliberate presentation of . . . perjury;"

3. Attacks the attorney for the accused for "humiliating" and "degrading" an alleged victim solely by reason of having confronted and cross-examined him;

4. States that "there will be a better life for everyone in this district" if the accused is found guilty; and,

5. Directly infers that the trial judge favors a guilty verdict?

STATUTORY PROVISIONS INVOLVED

No statutory provisions are involved in the instant case.

STATEMENT OF THE CASE

The Petitioner was indicted by a Grand Jury in the United States District Court for the Western District of New York on September 6, 1972, for various alleged violations of the Hobbs Act (Title 18, United States

Code, Section 1951). The Petitioner and three co-defendants were tried before the Honorable John O. Henderson, United States District Court Judge, and a jury, beginning on November 28, 1972, and ending on December 14, 1972. At the end of his closing arguments to the jury, the government prosecutor stated:

> "Ladies and gentlemen, I have touched on, as quickly as I could, because I know that you have been sitting so patiently all day, what I consider to be the most significant areas, the cornerstones, the beacons that help you cut through everything and see the truth, and what you have now seen, I submit to you, is the stranglehold, the stranglehold these people, Frank Valenti, Joe Zito, DiFrancesco, primarily, have on construction in Genesee County. You are seeing a little bit of a very dirty, insidious cancer on society, and you now are going to have two choices. You can find these defendants not guilty, that is certainly one of the verdicts available to you. If you do, you will be endorsing the perjury of Panepinto, you will be endorsing the deliberate presentation of the perjury by those who called them to the stand, you will be endorsing the disgrace that the poor victim had to endure of being humiliated for three days, when he finally, a victim, has come forward and comes into court to testify, and is humiliated and degraded, your verdict will endorse that or, as Judge Henderson has pointed out before, you can leave this courtroom with your heads held high, knowing that you have done something to better the community, you have done something to eradicate the cancer of Genesee County, the cancer of the construction business—
>
> "The Court: Are you saying that I made such a remark?
>
> "Mr. Ozer: No, your Honor.

"The Court: Be careful how you connect me with your arguments.

"Mr. Ozer: No, your Honor, it is certainly my remarks.

"I submit to you, ladies and gentlemen, to do justice in this case, to do justice to the community, to do justice to Genesee County, and the district of which you are sworn as a juror, you will convict these defendants, you will find them guilty, because they have done what they are charged with doing, and there will be a better life for everyone in this district. Thank you."

Objections were timely made by Petitioner's trial counsel and a motion for a mistrial was made and denied. When asked to caution the jury with specific reference to the prosecutor's remarks, the District Judge refused, saying: "I think it would worsen it, Mr. Shanahan. I think I will leave it where it is." A later, generalized statement was made to the jury that "bickering back and forth" by the lawyers and "waving the flag" should be "rejected from your minds." The jury returned a verdict of guilty against the Petitioner as to six of the fifteen counts contained in the indictment. Petitioner was sentenced to a term of imprisonment of twenty years and required to pay fines totaling Sixty Thousand Dollars ($60,000.00).

A timely appeal was taken by the Petitioner to the United States Court of Appeals for the Second Circuit. On August 13, 1973, the Court of Appeals for the Second Circuit affirmed the judgment of conviction entered against the Petitioner in a *per curiam* order without opinion. In his appeal to the Court of Appeals, the Petitioner urged, *inter alia,* that error had been committed by the District Court Judge in his

failure to grant the Petitioner's motion for a mistrial relating to the remarks of the prosecutor set forth above.

REASONS FOR GRANTING THE WRIT

The Court of Appeals So Far Sanctioned a Departure From Applicable Decisions of This Court and From the Accepted and Usual Course of Judicial Proceedings as To Call for an Exercise of This Court's Power of Supervision.

"On the Supreme Court rests the prime responsibility for the proper functioning of the Federal judiciary." Stern and Gressman, Supreme Court Practice (4th edition), Section 4.16, page 177. It is to this repsonsibility that the Petitioner directs the thrust of his Petition for a Writ of Certiorari since it is his contention that the Court of Appeals sanctioned a major departure by the District Court Judge from the accepted and usual course of judicial proceedings as well as applicable decisions of this Court, and that exercise of this Court's power of supervision is called for under Rule 19.1(b). Where an important question has been raised and doubtfully determined by a Court of Appeals or where a question is raised as to the proper administration of criminal justice in federal courts, this Court's discretionary jurisdiction by way of certiorari is properly invoked. *Williams* v. *Lee*, 358 U.S. 217; *McNabb* v. *United States*, 318 U.S. 332; *Marshall* v. *United States*, 360 U.S. 310.

The proper role of the prosecuting attorney in argument to the jury in a criminal case has been described recently, in part, in the following terms:

> "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the

truth or falsity of any testimony or evidence or the guilt of the Defendant.

The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, Sections 5.8(b), 5.8(c), and 5.8(d).

Expressed in simpler terms, this Court has said that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States,* 295 U.S. 78,88. Here, Petitioner contends that not one, but at least five "fouls" were struck by the prosecutor. Even if, *arguendo,* one of the prosecutor's "fouls' were not viewed as sufficiently prejudicial as to have deprived the accused of a fair trial and to warrant a reversal, Petitioner respectfully submits that a substantial question is raised as to whether or not the five "fouls" *collectively* deprived him of a fair trial. *Chambers* v. *Mississippi,*—U.S.—, 35 L. Ed. 2d 297.

The prosecutor's "parting shot" as he concluded his remarks to the jury was that "there will be a better life for everyone in this district" if the Petitioner and his co-defendants were found guilty. Invoking the

passions and prejudices of a jury for the protection of the community is highly improper and has been condemned by this Court. *Viereck* v. *United States,* 318 U.S. 236, 247-8. For an extensive collection of cases on the impropriety of such remarks, see Annotation, 85 A.L.R. 2d 1132.

So also, the prosecutor's attempts to infer the District Judge's preference for a guilty verdict were equally, if not more, improper and prejudicial to the Petitioner's right to a fair trial. This conduct of the prosecutor was such a departure from accepted practice that it provoked the *sua sponte* interruption of the District Judge, although his lukewarm admonition to "be careful" could hardly be deemed curative. Cases almost universally condemning such practice have been collected in an Annotation at 127 A.L.R. 357. Nor can the prosecutor's attempts to align himself with the trial judge be deemed a spontaneous utterance in the midst of heated argument. Earlier in his closing argument, the prosecutor was interrupted by the District Judge and cautioned not to "tie yourself to my coat tails" when he repeatedly predicted that the Court's instructions would be favorable to his position. Hence, the persistent course of conduct of the prosecutor in aligning the District Judge with his position, culminating in an inference that he favored a verdict of guilty, was a plainly proscribed "foul" calculated to arouse passion and prejudice and therefore denied Petitioner a fair trial. *Berger* v. *United States, supra; Viereck* v. *United States, supra.*

Not content with attempting to align his position with that of the angels and community betterment, the prosecutor launched an unprovoked attack upon Petioner's counsel for "deliberate presentation of . . .

perjury" and humiliation of a government witness. Although an unprovoked attack on opposing counsel comes well within the "foul" rule of *Berger* v. *United States,* it is a practice which has received the specific condemnation of this Court in *New York Central Railroad Company* v. *Johnson,* 279 U.S. 310. Indeed, under appropriate circumstances, a suggestion of perjured testimony has been held sufficient to require reversal even though the point has not been raised by the parties. *Stewart* v. *United States,* 247 F.2d 42 (D. C. Cir., 1957). As one commentator has stated the rule, where "the attack upon defense counsel relates to his alleged dishonesty in conducting the defense, whether it consists in suborning perjury or in fabricating a defense, trickery or bad faith, misleading the jury or insincerity, such attack will always be considered improper and in most instances prejudicial." Annotation, "Propriety and Effect of Attack on Opposing Counsel during Trial of a Criminal Case," 99 A.L.R. 2d 508, 537.

Nor was any cure in the offing from the District Judge for the prejudicial wounds inflicted by the prosecutor's "fouls". The District Judge was content to "leave it where it is" and barely glossed over the prosecutor's impropriety when he suggested that the jury reject the "bickering back and forth" by the lawyers and their "waving the flag." The error not having been cured, Petitioner submits that the Court of Appeals, in its *per curiam* affirmance without opinion, "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 19.1(b). Perhaps one and even two of the prosecutor's "fouls" could be viewed, *arguendo,* as not suf-

ficiently prejudicial to have deprived the Petitioner of a fair trial. Collectively, however, this Court has recognized that an assortment of minor evils can rise to the level of a deprivation of a fair trial and Due Process. *Chambers* v. *Mississippi, supra.* Petitioner therefore respectfully submits that this Court should exercise its power of supervision and grant a Writ of Certiorari to review the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

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Attorney for Petitioner

Of Counsel:

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Arlington, Virginia

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of August, one thousand nine hundred and seventy-three.

Present: HON. WILLIAM H. MULLIGAN

HON. JAMES L. OAKES

HON. WILLIAM H. TIMBERS
Circuit Judges,

73-1573
73-1273

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

FRANK J. VALENTI, JOSEPH ZITO, HARRY RISO, and GENE DIFRANCESCO, *Defendants,*

FRANK J. VALENTI and JOSEPH ZITO,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

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MICHAEL RODAK, JR., CLERK

No. 73-1206

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OCTOBER TERM, 1973

FRANK VALENTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1206

FRANK J. VALENTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of conspiracy to extort and five substantive acts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to six concurrent terms of twenty years' imprisonment and fined $60,000. The court of appeals affirmed without opinion on August 13, 1973 (Pet. App.). The petition was not filed until February 5, 1974, and is substantially out of time under Rule 22(2) of this Court's Rules. There is, in any event, no reason to grant the writ.

[1] The jury found petitioner not guilty of two other acts of extortion.

Petitioner's sole contention, that the prosecutor's closing argument was prejudicial, is identical to a contention raised by petitioner's co-defendant in *Zito* v. *United States,* No. 73-5406, certiorari denied December 3, 1973. We rely upon our opposition to the petition in that case.[2]

Additionally, we note that the testimony of the extortion victims indicated that petitioner was in charge of the conspiracy and acts of extortion for which the defendants were convicted (Tr. 98, 111–116, 122–133). Petitioner offered the testimony of only one witness. Its purpose was to impeach the victim's credibility in regard to a loan he had once made (see Tr. 699–700, 1085–1089). The government later demonstrated that the loan was not improper. (Tr. 589–591, 623). In any event, the propriety of the loan was not a direct issue in this case. When considered in the light of the evidence presented at trial and in the context of the whole summation, any possible prejudicial impact of the prosecutor's remarks was minimal.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

[2] A copy of the government's opposition in *Zito* has been forwarded to petitioner's counsel. In his petition Zito cited and objected to the same language cited by petitioner.

U.S. GOVERNMENT PRINTING OFFICE: 1974